Supreme Court, U.S.
FILED
MAR 9 1993
OFFICE OF THE CLERK

No. 92-1355

In The

Supreme Court of the United States

October Term, 1992

FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, et al.,

Petitioners,

vs.

ROGER E. WILLIAMS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. Dickson Burton
Nicholas E. Hales
Reid W. Lambert
Woodbury & Kesler, P.C.
Attorneys For Respondents
265 East 100 South, Suite 300
Post Office Box 3358
Salt Lake City, Utah 84111
Telephone: (801) 364-1100

March 9, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS FOR REVIEW

In the District Court, Plaintiffs/Respondents sought discovery of certain bank accounts and Defendants/Petitioners filed a Motion to Quash Subpoenas and for a Protective Order. The District Court denied Defendants' Motion, and Defendants appealed to the Tenth Circuit Court of Appeals, which dismissed the Appeal for want of jurisdiction.

Plaintiffs contend that the following is the only issue for review on Certiorari:

> Did the Tenth Circuit Court of Appeals err in determining that the Order denying Defendants' Motion to Quash Subpoenas and for a Protective Order was not an appealable final decision under 28 U.S.C. § 1291.

Because the Tenth Circuit did not reach the merits of Defendants' assertion of privilege, Questions 2 and 3 set forth in Defendants' Petition are not properly subject to review on Certiorari.

TABLE OF CONTENTS

Page

QUESTIONS FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Borden Co. v. Sylk, 410 F.2d 843 (3rd Cir. 1969) 6

Britt v. Superior Court of San Diego County, 20 Cal.3d 844, 143 Cal Rptr. 695, 574 P.3d 766 (1978) 7

Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3rd Cir. 1986) 6

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 5, 6

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 6

Gipson v. Brown, 295 Ark. 371, 749 S.W.2d 297 (1988) 7

Grinnell Corp. v. Hacket, 519 F.2d 595 (1st Cir. 1975) 6

Gulf Stream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 6

NAACP v. Alabama, 357 U.S. 449 (1958) 7

PROVISIONS AT ISSUE

Plaintiffs contend that the First Amendment of the United States Constitution which is set out in Defendants' Petition is not at issue before this Court. The narrow basis for the Tenth Circuit's dismissal of Defendants' appeal was a lack of jurisdiction under 28 U.S.C. § 1291. It is therefore not within this Court's purview to examine the underlying merits of Defendants' assertion of a First Amendment privilege.

The relevant statutory provision for scrutiny before this Court is 28 U.S.C. § 1291, which provides as follows:

> The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands except where direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title.[1]

---

[1] Defendants have previously argued that the District Court's Order was appealable under 28 U.S.C. § 1292(a) as an injunction. However, Defendants' Petition has not raised this question for review on Certiorari.

STATEMENT OF THE CASE

Plaintiffs submit that Defendants' Statement of the Case is inappropriate for two reasons. First, Defendants' Statement deals almost exclusively with the assertion of privilege and with the merits of the underlying case. Defendants have ignored the narrow jurisdictional grounds for the Tenth Circuit's dismissal in favor of arguing matters which have not been decided by the Tenth Circuit or even the District Court. Plaintiffs thus contend that Defendants' Statement goes beyond the scope of this Court's jurisdiction on Certiorari.

Second, Defendants' Statement of the Case mischaracterizes the facts and the record below. For instance, Defendants state that the underlying litigation arises from a dispute over religious matters when in fact it arises from a dispute over contract and property rights. Defendants state that the bank accounts at issue are Church records and contain only Church money when in fact the accounts are held in the names of individuals and are commingled with personal and trust money. Defendants state that the United Effort Plan Trust ("UEP") was formed "to facilitate the living of the United Order of Heaven" or the "Law of Consecration and Stewardship," *see* Defendants' Petition, at 2, 5, when in fact the Trustees and Church leaders have emphatically stated that the UEP was not intended to establish the United Order of Heaven and serves purposes unrelated to the Law of Consecration and Stewardship. Defendants further state that the UEP owns no property other than real estate when in fact the UEP has held or now holds interests in various businesses and personal property and has

received cash payments in connection with various transactions. Defendants further state that the taxes on UEP property have been paid from Church funds held by the Church leaders when in fact the UEP has sent tax notices and collected separate tax payments from its beneficiaries and has appointed an officer to oversee the collection and payment of taxes. Defendants further state that Plaintiffs have made no contributions to the Trust when in fact the Plaintiffs have all donated sufficient land, labor, or money to be deemed beneficiaries by the Trustees. Finally, Defendants have submitted as Appendix C a summary of the disputed bank accounts purporting to represent Plaintiffs' understanding of each account. In fact, Plaintiffs have submitted to the District Court and included in the record to the Tenth Circuit a detailed and verified summary of the accounts which describes how each account contains commingled funds relating to the UEP or its Trustees.[2]

With respect to the issue of appellate jurisdiction, Plaintiffs offer the following summary of the operative facts. Plaintiffs' Complaint alleges two general categories of claims against the UEP and its Trustees. First, Plaintiffs allege that they contributed money, labor or property to the UEP in exchange for the right to occupy an assigned lot in perpetuity. Plaintiffs claim that the Defendants breached this contract or defrauded the Plaintiffs by declaring all beneficiaries tenants at will on UEP land and then attempting to evict those not in harmony with the

---

[2] Because the Tenth Circuit did not reach the merits of the appeal, Plaintiffs believe it unnecessary to set forth a detailed summary of the accounts herein.

religious beliefs of the Trustees. Plaintiffs' second category of claims includes causes of action against the Trustees for breach of fiduciary duty, self-dealing, commingling of funds, and other claims arising from mismanagement of UEP assets. The Defendants' principal defense to both categories of claims is an alleged right of religious immunity arising from the First Amendment. In particular, Defendants have attempted to characterize the UEP as a religious entity and to characterize its management as an act of religious exercise, arguing thereafter that the Court may not exercise jurisdiction over the religious functions of the entity.

In 1989, Plaintiffs identified approximately 17 bank accounts held in the names of certain Trustees. Plaintiffs issued subpoenas to third party banks to obtain the account records, and the Defendants filed a Motion to Quash Subpoenas and for a Protective Order. On November 16, 1990 the District Court denied Defendants' motion and ordered production of the account records. *See* Defendants' Petition, Appendix B. In the context of the District Court's decision, the Court found that there was "no danger that discovery of the Trust's operating accounts will chill the free exercise of religion." Defendants' Petition, at B-12. The Court further pointed out that the case presented "no danger of intrusive government monitoring or regulation of religious activity." *Id.* at B-13. On that basis, the District Court rejected Defendants' claim of First Amendment privilege.

Thereafter, Defendants filed motions for clarification, for certification for interlocutory appeal, and for stay of the order pending appeal. All of Defendants' motions

were denied, and on May 20, 1991, Defendants filed a Notice of Appeal.

On Appeal, the Defendants again argued that the UEP was a religious body and that the discovery of UEP documents would infringe upon rights of free exercise and association. The Tenth Circuit concluded that it was without jurisdiction on appeal because the District Court Order was not a final decision for purposes of 28 U.S.C. § 1291. In particular, the Court ruled that the Order was not appealable under the doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because it did not address a matter "completely separate from the merits of the underlying action." See Defendants' Petition at A-2.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Plaintiffs submit that the Tenth Circuit was correct in concluding that the District Court's Order of November 16, 1990 did not constitute a final decision under 28 U.S.C. § 1291. Under the *Cohen* doctrine, the Supreme Court has held that an interlocutory ruling may be appealable as a "collateral order" if the following conditions are satisfied:

> First, the order must "conclusively determine the disputed question." Second, the order must "resolve an important issue completely separate from the merits of the action." Third and finally, the order must be "effectively unreviewable on appeal from a final judgment."

Gulf Stream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

In this case, the Tenth Circuit ruled that the District Court's Order was not a collateral order under *Cohen* because it was not completely separate from the merits of the case. The Tenth Circuit's decision followed well-settled and universally-accepted principles of federal law. Specifically, in at least three cases, appellate courts have refused jurisdiction over discovery disputes on the grounds that resolution would necessarily entail consideration of the underlying merits of the lawsuit. *See Grinnell Corp. v. Hacket*, 519 F.2d 595 (1st Cir. 1975); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986); *Borden Co. v. Sylk*, 410 F.2d 843 (3rd Cir. 1969). Defendants have not identified any split of authority or unsettled question of law requiring resolution in this Court, nor have they cited authority for their position that a discovery order may be reviewed under *Cohen* even if it requires inquiry into the merits. In short, Defendants have identified no error of law at either the District Court or the Circuit Court level, but have merely sought a different outcome based on their version of the facts.

Ironically, Defendants' Petition actually confirms the Tenth Circuit's conclusion by addressing numerous issues central to the merits of the underlying lawsuit. In particular, Defendants ask this Court to examine the relationship of the FLDS Church and the UEP, to ascertain the charitable or sacerdotal nature of the UEP, and to define the scope of the Trustees' duties in administering UEP assets. Each of these matters is central to the merits of the ongoing litigation, and the District Court has expressly

reserved each for trial. In short, Defendants have sought an adjudication on appeal of issues central to the merits of the underlying litigation even before those issues have been decided in the District Court. Plaintiffs contend that 28 U.S.C. § 1291 does not contemplate resolution of the merits of a lawsuit in this manner.

To the extent that inquiry into Defendants' claim of privilege is appropriate on Certiorari, Plaintiffs contend that Defendants have not identified any error of law in the District Court's reasoning. Instead, Plaintiffs have relied on state court cases such as *Britt v. Superior Court of San Diego County*, 20 Cal.3d 844, 143 Cal. Rptr. 695, 574 P.2d 766 (1978), and *Gipson v. Brown*, 295 Ark. 371 749 S.W.2d 297 (1988), which do not accurately reflect the federal law. Plaintiffs contend that the District Court properly applied the well-established principles laid down in *NAACP v. Alabama*, 357 U.S. 449 (1958), and its progeny in rejecting Defendants' claim of privilege. Because the District Court found that no chilling effect on the free exercise of religion was presented in this case, it correctly concluded that no privilege applied. For this reason, Plaintiffs contend that the District Court's decision was proper and that Plaintiffs should be afforded full and fair discovery in this case.

CONCLUSION

In an attempt to broaden the scope of this Court's review, Defendants have presented issues beyond the scope of the Tenth Circuit's decision dismissing their

appeal. Plaintiffs contend that the Tenth Circuit's dismissal of the appeal was proper because the District Court's discovery order necessarily involved resolution of issues central to the merits of the case. For these reasons, Plaintiffs urge this Court to deny Defendants' Petition for Writ of Certiorari.

Respectfully submitted,

H. Dickson Burton
Nicholas E. Hales
Reid W. Lambert
Attorneys for Respondent
265 East 100 South, Suite 300
Salt Lake City, Utah 84111

March 9, 1993